No. 15-1302

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO

Intervenor

v.

SEEDORFF MASONRY, INC.

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

KIRA DELLINGER VOL
Supervisory Attorney

MARNI VON WILPERT
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-0656
(202) 273-2903

RICHARD F. GRIFFIN, JR
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

Statutes: **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. §151, et seq.)

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SUMMARY OF THE CASE

The National Labor Relations Board ("the Board") seeks enforcement of its Order against Seedorff Masonry, Inc. ("the Company"). On July 19, 1988, the Company signed an individual agreement binding it to a collective-bargaining agreement between a multiemployer association called the Quad Cities Builders Association ("the Association") and the International Union of Operating Engineers Local 150, AFL-CIO ("the Operators"). In that 1988 agreement, the Company not only agreed to be bound by the Association's then-existing collective-bargaining agreement, but also by "all subsequent contracts negotiated between the Union and the Association." Over the following decades, the Association and the Operators negotiated ten successive multiemployer agreements, including the 2010-2014 agreement at issue in this case. On April 12, 2012, the Company unlawfully repudiated its obligation to comply with that agreement mid-term, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (1).

This case involves the application of well-settled legal principles, and the Board's findings of fact are supported by substantial evidence. Should the Court grant the Company's request for oral argument, the Board believes that 15 minutes per side would suffice.

STATEMENT OF JURISDICTION

This case is before the Court on the application of the Board to enforce a Decision and Order it issued against the Company on May 7, 2014, reported at 360 NLRB No. 107.[1] The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended ("the Act"), 29 U.S.C. §§ 151, et seq. The Board's Order is final under Section 10(e) of the Act, 29 U.S.C. § 160(e).

The Court has jurisdiction over the Board's application pursuant to Section 10(e) of the Act, as the underlying unfair labor practices occurred in Strawberry Point, Iowa. The Board's application was timely filed, as the Act imposes no time limit for such filings.

STATEMENT OF THE ISSUE PRESENTED

Does substantial evidence support the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by repudiating a multiemployer collective-bargaining agreement between the Association and the Operators, to which the Company was bound as a signatory employer?

- *Cedar Valley Corp. v. NLRB*, 977 F.2d 1211 (8th Cir. 1992).

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[1] "A" refers to the joint appendix, and "Br." to the Company's brief. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

- *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987), *enforced sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1990), *cert. denied*, 488 U.S. 889 (1988).

-*In Re Cab Assocs.*, 340 NLRB 1391 (2003).

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This unfair-labor-practice case came before the Board on a complaint issued by the Board's Acting General Counsel, pursuant to a charge filed by the Operators. (A 3; A 170.) The complaint alleged that the Company had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to adhere to the terms of a collective-bargaining agreement between the Operators and the Association, to which the Company was a signatory. (A 3; A 162-63.) Following a hearing, an administrative law judge issued a decision on November 19, 2013, finding that the Company violated the Act as alleged. (A 8.) The Company excepted to the administrative law judge's decision before the Board. (A 1.) On May 7, 2014, the Board issued a Decision and Order affirming the judge's finding that the Company had violated Section 8(a)(5) and (1), and adopting her recommended order with certain modifications. (A 1.)

II. THE BOARD'S FINDINGS OF FACT

A. Background: The Operators, the Association, and the Company

The Operators, a labor organization, covers a territory in the Midwest that includes counties in Illinois, Iowa, and Indiana. (A 4; A 47-48, 179.) The Association is a multiemployer association of contractors engaged in certain types of construction work within a portion of the Operators' territorial jurisdiction. The Association recognizes and bargains with the Operators as the sole collective-bargaining representative for all employees of the Association's signatory contractors who perform covered work. (A 4; A 47.)

Over the past few decades, the Operators and the Association have agreed to a series of collective-bargaining agreements ("the Quad Cities Agreements").[2] (A 4; A 51, 47.) Each Quad Cities Agreement covers the following categories of work: the operation or maintenance of all hoisting and portable machines and engines used on building and excavating work, or any other power machine that may be used for the construction, alteration, repair, or wrecking of a building or buildings within the Operators' jurisdiction. (A 4; A 178.) And each requires signatory contractors to obtain employees performing such work through the Operators' hiring hall and forbids them from subcontracting or subleasing that

[2] The part of the Operators' territorial jurisdiction covered by the Quad Cities Agreements encompasses Rock Island and Mercer Counties, and portions of Henry and Whiteside Counties, in Illinois, as well as Cedar, Clinton, Des Moines, Lee, Louisa, Muscatine, and Scott Counties in Iowa. (A 4 n.5; A 47-48, 178.)

work, unless the subcontractor is also a signatory to the Quad Cities Agreement. (A 4; A 180, 182.)

The Company is a masonry contractor and performs mostly commercial masonry work, installing brick, block, stone, and cast stone. (A 4; A 39-40.) Seasonally, it employs between ten and thirty bricklayers and between ten and thirty laborers. (A 5; A 104.) Robert Marsh is currently the Company's president, a position he has held since 2010. (A 4; A 101.) Marsh began working for the Company in 2006, and was previously the Company's Vice-President. (A 4; A 38, 101.) Mark Rima served as Respondent's vice president and controller for ten to fifteen years, but is no longer employed by the Company. (A 4; A 40-41.)

The Company's headquarters are in Strawberry Point, Iowa, and it has other offices in Nebraska and Iowa. (A 4; A 39.) The Company does most of its work in the Midwest, in Nebraska, Iowa, Illinois, Missouri, and Kansas. (A 4; A 40.) It has worked continuously in the Operators' jurisdiction since at least 2006. (A 5; A 104.)

B. The Company Signs an Individual Agreement Binding It to the Quad Cities Agreement and to All Subsequent Agreements between the Operators and the Association

On July 19, 1988, the Company became a signatory to the then-governing Quad Cities Agreement between the Association and the Operators, when Vice President/Controller Rima executed an "Individual Signers" addendum to the Quad

Cities Agreement ("the Individual Agreement").[3] (A 4; A 171.) The Individual Agreement states that, as a signatory employer to the Quad Cities Agreement, the Company:

> [A]grees to be bound by any amendments, extensions or changes in this Agreement agreed to by the Union and the Association, and *further agrees to be bound by the terms and conditions of any subsequent contracts negotiated between the Union and the Association* unless ninety (90) days prior to the expiration of this or any subsequent agreement said non-member employer notifies the Union in writing that it revokes such authorization.

(A 4; A 171) (emphasis added).[4] Since 1988, the Association and the Operators have negotiated ten successive Quad Cities Agreements. (A 4; A 51.)

The Individual Agreement further provides that the Operators' notice to the Association of its intent to reopen, terminate, or commence negotiations for a successor Quad Cities Agreement shall constitute notice upon the signatory employers as well. (A 4; A 171.) Under that provision, on March 1, 2006, the Operators sent a letter to the Association requesting to meet with the Association to negotiate a new Quad Cities Agreement, as their multiemployer contract was about

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[3] The Individual Agreement identifies the union party to the Quad Cities Agreement as Local 537 of the International Union of Operating Engineers. (A 4; A 171.) Local 537 merged with Local 150 in the early 1990s and this brief refers to both locals as "the Operators." (A 4; A 43-44, 49.)

[4] The Company also executed a participation agreement, which required that it contribute to the Operators' Pension and Welfare Funds in the amount established by the Quad Cities Agreement. (A 4 n.6; A 172, 198-201.)

to expire. (A 4; A 252.) The Association agreed to meet. (A 4; A 275.) As a signatory employer to the then-governing Quad Cities Agreement, the Company received a copy of the Association's letter agreeing to meet with the Operators to negotiate a successor contract. (A 4 n.7; A 106.)

From July to September 2009, the Company employed Jerry Hamlett, a union operator, to drive a boom truck on a school project in the territory covered by the Quad Cities Agreement. (A 5; A 111-12.) For the months it employed Hamlett, the Company remitted the specific dues and fringe benefits required under the then-governing Quad Cities Agreement to the Operators. (A 5; A 57, 198-201, 234-46.)

The Operators and the Association then negotiated a Quad Cities Agreement effective from June 1, 2010 to May 31, 2014 ("the 2010 Quad Cities Agreement"). (A 4; A 173.) The 2010 Quad Cities Agreement states that it will renew from year to year "unless either party serves written notice upon the other of intent to modify or terminate the Agreement no less than sixty (60) days prior to any expiration date." (A 4; A 230.)

C. Other Collective-Bargaining Agreements Involving the Operators and the Company

The Company and the Operators are both parties to another agreement in addition to the Individual Agreement and Quad Cities Agreement. In 2010, the Company signed a Project Labor Agreement with the Southeast Building and

Construction Trades Council ("the PLA"). (A 4; A 305.) The PLA governed only one project: the construction of a prison in Fort Madison, Iowa. (A 4; A 307.) The Operators is also a signatory to the PLA. (A 5; A 333.)

In June 2011, the Operators proposed that Seedorff sign on to another collective-bargaining agreement between the Operators and a different multiemployer association, the Mid-America Regional Bargaining Association. The Mid-America agreement covers parts of the Operators' jurisdiction in Illinois, but its geographic scope is different from that of the Quad Cities Agreement. (A 276; A 109, 179.) Seedorff declined. (A 110.)

D. The Operators Grieve the Company's Failure To Comply with the 2010 Quad Cities Agreement

In October 2011, the Operators' Business Representative, Ryan Drew, raised two concerns with the Company about the Company's assignment of work to non-Operator employees. The first related to operation of a boom truck at a construction site in Burlington, Iowa, an area within the Operators' jurisdiction and the coverage area of the 2010 Quad Cities Agreement. (A 5 & n.11; A 259.) The second related to maintenance of construction equipment on the prison project governed by the PLA. (A 5 & n.11; A 259.)

During October and November, the parties exchanged numerous emails and letters about those two disputed work assignments. On October 10, 2011, Company President Marsh sent Drew an email, indicating that the Company had

assigned operation of the Burlington boom truck to members of another union: the Laborers' International Union of North America ("the Laborers"). (A 5; A 259.) In that same email, Marsh also said that the Company does not usually perform maintenance work on leased equipment at the prison project, but that any minor maintenance work needed would be performed by the Laborers. (A 259.) In the October 10 email, Marsh did not mention or otherwise discuss the 2010 Quad Cities Agreement (or the PLA). (A 5; A 259.) On October 13, the Operators sent the Company letters about the two work-assignment grievances. (A 5; A 249, 253-55.) The Operators asserted that the Company had violated the 2010 Quad Cities Agreement by assigning covered work to employees who were not members of the Operators, and requested a Step II grievance meeting with the Company to discuss the situation. (A 5; A 226, 249, 253-55.)

On October 17, Marsh sent a letter to the Operators acknowledging receipt of the grievance letters. (A 5; A 339.) Marsh's letter stated, without explanation, that the Company's representatives would not be available to attend the Step II grievance meeting, and that the Company would not pay the amounts requested to settle the grievances. (A 5; A 339.) The letter provided no explanation for those decisions and did not reference the 2010 Quad Cities Agreement. (A 5; A 339.) A few weeks later, on November 3, 2011, Marsh sent Drew a follow-up email about the grievances. (A 5; A 262.) In his email, Marsh stated that, "[t]o my

knowledge, Seedorff Masonry, Inc. is not signatory to the current [2010] Quad City Agreement" and that the documents the Operators had sent earlier did not "appear to bind Seedorff Masonry to that agreement." (A 5; A 262.) Marsh requested that, "[i]f you disagree, please identify the documents(s) upon which you are relying. We will need this information to be able to address your grievances further. We will also need this information before I can further address the information requests you made previously." (A 5; A 262.) Within a few hours, Drew responded to Marsh's email and attached copies of documents—including the Individual Agreement—that he believed substantiated the Operators' position that the Company was a signatory to the 2010 Quad Cities Agreement. (A 5; A 262.) After the November email exchange, the Company continued to process the grievances according to the steps of the grievance-arbitration procedures in the 2010 Quad Cities Agreement. (A 5; A 78-80.) The parties agreed on an arbitrator and planned to meet at the Association's offices, but the arbitration was never held. (A 5; A 251.)

E. The Company Asserts That It Has No Current Collective-Bargaining Agreement with the Operators

Over two months later, on April 12, 2012, Seedorff's counsel sent a letter to the Operators offering to settle the prison grievance, which it referred to as "the PLA grievance," and the Burlington grievance. (A 5-6; A 247.) In the letter, Seedorff's attorney offered to pay the amount the Operators had requested to settle

the prison grievance if the Operators withdrew the Burlington grievance. In explaining that withdrawal request, the letter stated that, "[w]ith respect to the Burlington grievance, Seedorff does not believe that it has a current collective bargaining agreement with [the Operators]." (A 5-6; A 247.) Seedorff's counsel claimed that the last time Seedorff had signed a collective-bargaining agreement with the Operators was July 19, 1988, but that, since then, it had "consistently" informed the Operators that it had not assigned its bargaining rights to the Association. (A 5-6; A 247.) Seedorff's counsel also claimed that the Operators had notified the Association in 2006 that the union "was terminating the collective-bargaining agreement" and asserted that no new agreement was reached between Seedorff and the Operators. (A 5-6; A 247.) Therefore, Seedorff's counsel concluded, "no collective bargaining relationship currently exists" between Seedorff and the Operators. (A 5-6; A 247.)

On September 7, 2012, the Operators filed a charge with the Board, claiming that on or about April 12, 2012, the Company violated the Act by repudiating the parties' collective-bargaining agreement. (A 3; A 170.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On May 7, 2014, the Board (Chairman Pearce and Members Miscimarra and Hirozawa) affirmed the judge's findings and recommended order, as modified, and found that the Company had violated Section 8(a)(5) and (1) of the Act by

repudiating its obligations under the 2010 Quad Cities Agreement. (A 1 & n.1.) To remedy that violation, the Board's Order directs the Company to cease and desist from failing and refusing to bargain in good faith with the Operators as the collective-bargaining representative of all employees performing work as set forth in the 2010 Quad Cities Agreement and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A 2.) Affirmatively, the Board's Order requires the Company to: honor and comply with the terms of the 2010 Quad Cities Agreement and, absent timely written notice to the Operators, with any automatic renewal or extension of that agreement; make whole all affected bargaining unit employees for any loss of earnings and other benefits suffered as a result of its failure to honor the 2010 Quad Cities Agreement; make all contractually required contributions to the Operators' fringe benefits funds that it has failed to make since April 12, 2012; reimburse the unit employees for any expenses resulting from its failure to make those contributions; and post a remedial notice. (A 2.)

SUMMARY OF ARGUMENT

On July 19, 1988, the Company signed the Individual Agreement, in which it agreed to be bound not only by the then-current Quad Cities Agreement, but also by "all subsequent contracts negotiated between the Union and the Association." The Individual Agreement specifies that the Company may only terminate that

ongoing commitment by "notif[ying] the Union in writing that it revokes such authorization" ninety days before the Quad Cities Agreement in effect expires. The Company never notified the Operators that it was revoking its consent to be bound by subsequent Quad Cities Agreements. Therefore, the Company was bound by the 2010 Quad Cities Agreement at issue in this case. Accordingly, the Company's mid-term repudiation of that agreement in its April 12, 2012 letter violated Section 8(a)(5) and (1) of the Act.

In defending its unlawful repudiation of its longstanding contractual commitment, the Company raises a number of affirmative defenses, but has failed to meet its burden of proof as to any of them. Specifically, the unsubstantiated, conclusory testimony of the Company's president does not establish a stable, one-person unit. And the Company's attempts to transform this straightforward contract-repudiation case into an inter-union-jurisdictional dispute also fail. The Company properly raised its jurisdictional claim according to the Board's established procedures for resolving such inter-union disputes and cannot revive it here to avoid its contractual obligations to the Operators. Finally, the Company has not shown that it gave the Operators clear and unequivocal notice of its total contract repudiation prior to the letter the Company's attorney sent the Operators on April 12, 2012.

STANDARD OF REVIEW

The Board's findings of fact are "conclusive" when supported by substantial evidence on the record considered as a whole. 29 U.S.C. 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951); *accord Laborers Dist. Council of Minn. & N.D. v. NLRB*, 688 F.3d 374, 381 (8th Cir. 2012). Therefore, "'[t]his court must enforce the Board's order if the Board has correctly applied the law and if its findings rest upon substantial evidence.'" *Cedar Valley Corp. v. NLRB*, 977 F.2d 1211, 1215 (8th Cir. 1992) (quoting *GSX Corp. of Missouri v. NLRB*, 918 F.2d 1351 (8th Cir. 1990)). The Court "defer[s] to the Board's conclusions of law if they are based upon a reasonably defensible construction of the Act." *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 841 (8th Cir. 2003). Under the substantial-evidence test, a reviewing court may not displace the Board's choice between two fairly conflicting views of the facts, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 477, 488; *accord St. John's Mercy Health Sys. v. NLRB*, 436 F.3d 843, 846 (8th Cir. 2006). By contrast, the Court reviews any issues of contractual interpretation de novo. *Cedar Valley*, 977 F.2d at 1215.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO ABIDE BY THE TERMS OF THE 2010 QUAD CITIES AGREEMENT

A. The Company Was Bound by the Multiemployer Agreements between the Operators and the Association and Unlawfully Repudiated the 2010 Quad Cities Agreement

Under the Act, neither an employer nor a union may repudiate or otherwise refuse to abide by a collective-bargaining agreement to which it is bound during the contractual term. Here, ample evidence supports the Board's finding that the Company was bound by the 2010 Quad Cities Agreement because of its standing commitment to comply with agreements negotiated by the Operators and the Association. Ample evidence also supports the Board's finding that the Company unlawfully repudiated the 2010 Quad Cities Agreement in its April 12, 2012 letter to the Operators.

1. When an employer assigns its bargaining rights to a multiemployer association, the employer is bound by all of the association's subsequent multiemployer agreements unless it properly revokes its bargaining authority

The Board and Supreme Court have long recognized that employers may pool their resources and bargaining strength by authorizing a multiemployer association to bargain with a union on their behalf and to execute a contract if they reach agreement. *See Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S.

404, 409 (1982); *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 94-95 (1957). Multiemployer bargaining enables smaller employers to "bargain on an equal basis with a large union," and to avoid "the competitive disadvantages resulting from nonuniform contractual terms." *Truck Drivers Local 449*, 353 U.S. at 96. Additionally, "multiemployer bargaining enhances the efficiency and effectiveness of the collective-bargaining process and thereby reduces industrial strife." *Bonanno Linen*, 454 U.S. at 409-10 n.3. Multiemployer bargaining is therefore considered "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Truck Drivers Local 449*, 353 U.S. at 95; *accord Bonanno Linen*, 454 U.S. at 409.

When an employer assigns its bargaining rights to a multiemployer association and agrees to be bound by subsequent contracts negotiated by the association, the Board and this Court have found that the employer remains bound by those contracts until it effectively withdraws its authorization. *Kephart Plumbing*, 285 NLRB 612, 613 (1987) (employer bound by subsequent agreements because it failed to take any "action effectively withdrawing the multiemployer group's authority to bargain on the [employer]'s behalf" before ratification of successor contract); *see also Cedar Valley*, 977 F.2d at 1219 (same); *Elec. Workers v. Grimm*, 786 F.2d 342, 346 (8th Cir. 1986) (same); *Reliable Elec. Co.*, 286 NLRB 834, 836 (1987) (same). To effectively withdraw its bargaining

authorization, an employer must satisfy the terms of the termination provision in the contract in which it granted the authorization. *See Cedar Valley*, 977 F.2d at 1222 (finding an employer remained bound to agreements in which it assigned its bargaining rights to a multiemployer association because it "failed to formally terminate the [] agreements by the means required by the contracts"); *Grimm*, 786 F.2d at 346 (finding an employer's withdrawal of bargaining authority from a multiemployer association ineffective because it "fell short of fulfilling the termination procedure set out in the" agreement). In addition, an employer's withdrawal of bargaining authority from a multiemployer association is a separate action from terminating an existing collective-bargaining agreement. *Rome Elec. Sys.*, 349 NLRB 745, 747 (2007), *enforced*, 286 Fed. App'x 697 (11th Cir. 2008). In other words, by effectively revoking its bargaining authority, an employer revokes the multiemployer association's power to bind the employer to further agreements, but does not terminate the employer's obligation to comply with an existing agreement that the association has already negotiated.

2. An employer cannot unilaterally repudiate a collective-bargaining agreement during the term of the contract

Section 8(f) permits employers and unions in the construction industry to enter into prehire collective-bargaining agreements before a union has established its majority status. *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266 (1983); *accord Laborers Dist. Council of Minn. & N.D.*, 688 F.3d at 377 n.1. As the Supreme

Court explained, Congress enacted Section 8(f) because it "recognized that construction industry unions often would not be able to establish majority support with respect to many bargaining units" due to the "uniquely temporary, transitory, and sometimes seasonal nature of much of the employment in the construction industry." *Jim McNeff*, 461 U.S. at 266.

Prehire agreements made pursuant to Section 8(f) are "binding, enforceable, and not subject to unilateral repudiation throughout their term." *Cedar Valley*, 977 F.2d at 1215 (internal citation omitted); *McKenzie Eng'g Co. v. NLRB*, 182 F.3d 622, 625 (8th Cir. 1999). Therefore, as the Board held in its landmark Section 8(f) case, *John Deklewa & Sons, Inc.*, an employer violates Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by repudiating a Section 8(f) agreement during the contractual term, unless the covered employees have voted to reject the contracting union as their bargaining representative in a Board-conducted election. 282 NLRB 1375, 1386 (1987), *enforced sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1990), *cert. denied*, 488 U.S. 889 (1988); *accord NLRB v. W.L. Miller Co.*, 871 F.2d 745, 748 (8th Cir. 1989) (approving *Deklewa* rule). The Board has found that precluding parties from unilaterally repudiating their voluntary Section 8(f) agreements mid-term provides greater stability in the construction industry because "parties and employees will be aware of their respective rights, privileges, and obligations at all times during the relationship,"

thus avoiding the need for "protracted and complex litigation." *Deklewa*, 282 NLRB at 1386. The *Deklewa* rule also applies to Section 8(f) agreements negotiated by multiemployer associations. *See James Luterbach Constr. Co.*, 315 NLRB 976, 980 (1994) (If an "8(f) employer affirmatively agrees to be bound by the results of group bargaining, we will, consistent with *Deklewa*, hold that employer to its obligations.").[5]

Although a Section 8(f) agreement may not be repudiated during its term, the union—unlike a union with confirmed majority support—enjoys no presumption of majority status after the agreement expires, and either party may repudiate the Section 8(f) relationship at that time. *Deklewa*, 282 NLRB at 1386; *accord Laborers Dist. Council*, 688 F.3d at 377 n.1. An employer that has delegated its bargaining rights to a multiemployer association, however, has agreed to be bound to the association's future multiemployer agreements. Accordingly, it must effectively revoke that bargaining authority to end the Section 8(f) relationship. *Rome Elec.*, 349 NLRB at 747; *Luterbach Constr.*, 315 NLRB at 980; *Cedar Valley*, 977 F.2d at 1219; *Grimm*, 786 F.2d at 346; *Reliable Elec.*, 286 NLRB at 836; *Kephart Plumbing*, 285 NLRB at 613.

[5] "A violation of Section 8(a)(5) of the Act produces a derivative violation of Section 8(a)(1)." *St. John's Mercy Health Sys.*, 436 F.3d at 846.

3. The Company was bound by the 2010 Quad Cities Agreement, and unlawfully repudiated that agreement mid-term

Substantial evidence supports the Board's findings (A 1 n.1) that the Company was bound to the 2010 Quad Cities Agreement by way of the 1988 Individual Agreement, and that the Company unlawfully repudiated the 2010 Quad Cities Agreement mid-term. As the Board found, the record evidence shows that on July 19, 1988, the Company executed the Individual Agreement, thereby becoming a signatory to the then-governing Quad Cities Agreement. On its face, the Individual Agreement further states that the Company "agrees to be bound by the terms and conditions of *any subsequent contracts* negotiated between the Union and the Association." (A 4; A 171) (emphasis added). In other words, by signing the Individual Agreement, the Company assigned its bargaining rights to the Association.[6] *See Cedar Valley*, 977 F.2d at 1222 n.10 ("[B]y virtue of . . . [employer's] grant of [bargaining] authority to Associated Contractors," the employer "became obligated to extensions or future agreements between the Association and the complaining unions.").

The Individual Agreement also specifies that the Company may only terminate its consent to be bound by future agreements between the Operators and the Association if the Company notifies the Operators in writing that it revokes

[6] In denying any such assignment (Br. 26), the Company cites only the knowledge of President Marsh, who did not join the Company until 2006. (A 101.)

such authorization ninety days prior to the expiration of the extant Quad Cities Agreement. (A 171.) The Company produced no evidence that it had ever sent the required written notice to the Operators. (A 1 n.1, 6; A 43, 62.) Indeed, both Company President Marsh and Operators Business Representative Drew stated that the Company has never provided the Operators written notice that it was revoking the Association's bargaining authorization. (A 1 n.1, 6; A 43, 62.) Therefore, as the Board found, the Company remained bound to comply with all subsequent Operators-Association agreements—including the 2010 Quad Cities Agreement—pursuant to the plain language of the Individual Agreement.

Indeed, this Court previously found that another employer was bound by a nearly identical multiemployer Section 8(f) collective-bargaining agreement under very similar circumstances. In *Cedar Valley Corporation*, the employer became a signatory to a Section 8(f) prehire collective-bargaining agreement between the Quad Cities Association and the Operators. 302 NLRB 823, 825 (1991), *enforced*, 977 F.2d 1211 (8th Cir. 1992). The employer's individual 1978 agreement stated that the employer "agreed to be bound by the terms and conditions of all subsequent contracts negotiated between the Union and the Association" unless it gave the union timely written notice revoking its authorization. *Id.* at 826. Based on the plain language of that contract—which is strikingly similar to the language of the Company's Individual Agreement here—this Court found that the employer

was bound to the subsequent collective-bargaining agreements negotiated by the Association. *Cedar Valley*, 977 F.2d at 1219. It held that because the employer—like the Company here—had never given the Operators timely written notice of its intent to withdraw its assignment of bargaining authority from the Association, the employer could not unilaterally repudiate a successor contract mid-term. *Id.*; *see also Twin City Garage Door Co.*, 297 NLRB 119, 119 n.2 (1989) (when employer signed agreement binding itself to all successor collective-bargaining agreements, "it could not repudiate its 8(f) relationship with the union until it provided timely notice of termination," and could not repudiate the then-effective multiemployer agreement mid-term); *Kephart Plumbing*, 285 NLRB at 612-13 (finding employer could not unilaterally repudiate a multiemployer 8(f) contract mid-term because it had assigned bargaining authority to the association and had not effectively revoked that authority before the successor agreement became effective).

More fundamentally, *Cedar Valley* reaffirmed the Board's long-standing rule—based on general contract principles—that an employer who has assigned its bargaining rights to a multiemployer association may only revoke such authorization by complying with the termination provisions in the contract that made the assignment. 977 F.2d at 1222 (finding the employer did not effectively withdraw its bargaining authority because it "failed to formally terminate the [bargaining authority] agreements by the means required by the contracts"); *accord*

Grimm, 786 F.2d at 346. Because the plain language of the Company's Individual Agreement clearly states that the only way to revoke such authorization is for *the Company* to give the Operators written notice of its intent to do so ninety days prior to the expiration of the extant Quad Cities Agreement, there is no merit to the Company's apparent assertion (Br. 26-30) that *the Operators* terminated the parties' bargaining relationship.

More specifically, although the Operators sent the Association a letter on March 1, 2006, seeking to negotiate a successor to the parties' soon-to-expire Quad Cities Agreement, the Company wrongly asserts that the letter terminated that agreement. As the Board found (A 4 n.7, 6), the Operators' letter followed the notification procedures set forth in the Individual Agreement for *modifying* a Quad Cities Agreement, under which notification to the Association only (rather than to each signatory employer) is sufficient, and clearly stated the Operators' intent to negotiate a successor agreement.[7] The letter did not purport to affect Seedorff's assignment of bargaining rights to the Association, nor could the Operators do so under the terms of the Individual Agreement. Pursuant to the plain language of the Individual Agreement, there is only one way for the Company to terminate its consent to be bound by Operator-Association bargaining agreements, and it is

[7] To the extent the letter "terminated" the then-current Quad Cities Agreement, as the Company asserts (Br. 26-29), it is undisputed that the Operators and the Association negotiated a successor agreement. (A 51.)

undisputed that the Company did not do so before the Operators and the Association executed the 2010 Quad Cities Agreement.[8]

Like the Board's finding that the Company was bound to honor the 2010 Quad Cities Agreement, the Board's finding that the Company unlawfully repudiated that contract mid-term is also supported by ample evidence in the record. The 2010 Quad Cities Agreement is a multiemployer, prehire collective-bargaining agreement under Section 8(f) of the Act, and as discussed above, *supra* pp. 18-20, neither an employer nor a union can unilaterally repudiate such an agreement during its term. On April 12, 2012, years before the contract's May 31, 2014 expiration date, the Company's attorney sent a letter to the Operators stating that "Seedorff does not believe that it has a current collective bargaining agreement with [the Operators]," and "therefore requests that [the Operators] withdraw the Burlington grievance." (A 247.) As the Board found (A 1 n.1), the Company thus failed and refused to abide by the terms of the 2010 Quad Cities Agreement in violation of Section 8(a)(5) and (1) of the Act.

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[8] The Company's suggestion (Br. 17-18) that the Operators' June 2011 request that it sign on to the Mid-America agreement—a contract between the Operators and a different multiemployer association—indicates that the Operators knew it did not have an existing contract with the Company is both legally irrelevant and factually misguided. The Mid-America agreement has no bearing on either the 2010 Quad Cities Agreement or the Individual Agreement. The Company has not shown that the two multiemployer associations and their agreements cover the same parts of the Operators' jurisdiction, and the record suggests they do not. *See supra*, p. 9.

B. The Company Has Not Met Its Burden To Prove Any of Its Affirmative Defenses

The Company has not met its burden to prove any of its affirmative defenses. Specifically, as the Board found, the Company failed to prove the existence of a stable, one-person unit, and it cannot evade its contractual obligations or its burden of proof by attempting to transform this contract-repudiation case into an inter-union dispute. The Company also failed to prove that the Operators' charge was not timely filed. Ample evidence supports the Board's finding that the limitations period commenced on April 12, 2012, when the Company first clearly and unequivocally repudiated the 2010 Quad Cities Agreement.

1. The Company has not produced any concrete evidence of a stable one-person unit

As the Board acknowledged (A 7), an employer may repudiate a Section 8(f) agreement without violating Section 8(a)(5) of the Act "if [the] employer employs one or fewer unit employees on a permanent basis." *Stack Elec.*, 290 NLRB 575, 577 (1988); *accord J.W. Peters, Inc. v. Iron Workers Local 1*, 398 F.3d 967, 973 (7th Cir. 2005) (quoting *Stack*); *Laborers Health & Welfare Trust Fund for N. Cal. v. Westlake Dev.*, 53 F.3d 979, 983 (9th Cir. 1995). Since the Act does not empower the Board to certify a one-person unit, "[b]y parity of reasoning, the Act precludes the Board from directing an employer to bargain with respect to such a

unit." *Stack Elec.*, 290 NLRB at 577 (citing *Foreign Car Center*, 129 NLRB 319, 320 (1960)); *accord McDaniel Elec.*, 313 NLRB 126, 127 (1993); *Haas Garage Door Co.*, 308 NLRB 1186, 1187 (1992). The Board, however, "require[s] proof that the purportedly single-employee unit is a stable one, not merely a temporary occurrence." *McDaniel Elec.*, 313 NLRB at 127; *accord Galicks, Inc.*, 354 NLRB 295, 299 (2009), *adopted and incorporated by Galicks, Inc.*, 355 NLRB 366 (2010), *enforced*, 671 F.3d 602 (6th Cir. 2012). As with any affirmative defense, the burden is on the Company to prove it only had one employee in the unit at all relevant times, including the time the contract was executed and the most recent period preceding the unfair-labor-practice hearing. *McDaniel Elec.*, 313 NLRB at 127; *accord Galicks, Inc.*, 354 NLRB at 299.

Substantial evidence supports the Board's finding (A 1 n.1, 8) that the Company failed to prove a stable, one-person unit. In support of that defense, the Company relies principally on the testimony of its president. When asked whether the Company had ever employed more than one operator at a time in the Operators' jurisdiction, Marsh stated: "According to the payroll records I looked at, no" and explained that he had reviewed payroll records "from 1993 on." (A 105.) The Company failed, however, to produce any payroll records—which it alone controls—at the hearing. Accordingly, as the Board explained (A 1 n.1, 7),

the administrative law judge properly drew an adverse inference that the missing payroll documents would not support the Company's one-person-unit defense.

The adverse-inference rule provides that "when a party has relevant evidence within its control which it fails to produce, that failure gives rise to an inference that the evidence is unfavorable to the party." *Rockingham Mach.-Lunex Co. v. NLRB*, 665 F.2d 303, 304 (8th Cir. 1981) ("The adverse inference rule is an important one that should be applied by the Board whenever it is appropriate."); *see also Alois Box Co. v. NLRB*, 216 F.3d 69, 75 (D.C. Cir. 2000) (finding adverse inference appropriate when "the company was in a position to clarify the record but failed to call [the employee as a witness]"); *Galesburg Constr.*, 267 NLRB 551, 552 (1983), *enforced mem.*, 703 F.2d 571 (7th Cir. 1983) ("Respondent's failure to produce [payroll] documents in its control and which were vital to prove its defense" led the Board to infer that "the records did not support Respondent's position").[9] In light of the Company's failure to produce the payroll records, the

[9] The evidence supporting the employer's one-person-unit defense in *Baker Concrete Construction, Inc. v. Iron Workers Local 372*, No. 1:13–cv–225, 2014 WL 4961488 (S.D. Ohio Oct. 2, 2014), was not, as the Company implies (Br. 26), analogous to its evidence here, and it was uncontested. The Court in that case cited an affidavit, deposition testimony, and four exhibits substantiating the employer's one-person-unit claim. *Id.* at *1, 5. And the union did not dispute that claim but, rather, asserted that the employer had effectively employed covered employees through an alter ego company. *Id.* at *1, 5.

administrative law judge properly drew an adverse inference against the Company. (A 7).

Contrary to the Company's argument (Br. 21-22), records documenting payments to the Operators' benefits funds on behalf of employee Jerry Hamlett are insufficient to substantiate President Marsh's testimony and satisfy its burden of proof in lieu of payroll records. The Acting General Counsel introduced the fund documents to show that the Company was still complying with its obligations under the Quad Cities Agreements, at least occasionally. And they cover only a three-month period in 2009, whereas Marsh testified that he had reviewed payroll records dating back to 1993. The benefit-fund documents illustrate one instance of contract compliance but do not even purport to show all contractual benefit payments, much less to paint a full picture of the Company's workforce over time, as payroll documents would.[10] For that reason, they fall far short of proving Marsh's claim that the Company has maintained a stable, one-person unit since 1993.

In addition to drawing an adverse inference based on the Company's utter failure to substantiate its conclusory claim of a one-person unit, the Board also

[10] Contrary to the Company's assertion (Br. 22), the judge did not prevent it from submitting documents to corroborate Marsh's characterization of its payroll as indicating employment of only one operator. She rebuffed its attempt to submit evidence in support of an inter-union jurisdictional-dispute argument. *See infra*, pp. 30-31 (explaining Board's jurisdictional-dispute procedures).

noted (A 1 n.1, 7-8) that the record as a whole undermines that defense. The record evidence indicates that employees who were not members of the Operators performed work covered by the Quad Cities Agreements' unit description. (A 7 & n.15, 8; A 129-30.) That fact reinforces the Board's finding (A 1 n.1, 7-8) that Marsh's assertion that the Company employed no more than one *operator* at a time—even if accepted at face value in the absence of corroborating evidence—does not establish a one-person unit: employees who were not members of the Operators were performing the covered work, so there may well have been enough unit work for more than one employee at a time. The Company attempts (Br. 18-20) to use that inconvenient fact to transform this case involving its repudiation of its contractual obligations into an inter-union jurisdictional dispute under Section 10(k) of the Act, 29 U.S.C. § 160(k). But it has already properly raised its jurisdictional-dispute argument to the Board to no avail, and cannot now avoid an unfair-labor-practice ruling by reviving that unsuccessful argument here.

Under Section 10(k), the Board is empowered to decide jurisdictional disputes between unions and to affirmatively award disputed work to one of the unions. *NLRB v. Radio & Television Broad. Eng'rs Union*, 364 U.S. 573, 577-79 (1961). Section 8(b)(4)(D) of the Act, 29 U.S.C. § 158(b)(4)(D), prohibits unions from using threats or coercion to try to force an employer to assign certain work to a particular labor organization, and the Board may not proceed with a

determination of a dispute under Section 10(k) unless the Board first finds that "there is reasonable cause to believe that Section 8(b)(4)(D) has been violated." *Roberts Pipeline, Inc.*, 361 NLRB No. 13, 2014 WL 3850323, at *2 (2014). To meet that threshold, the Board must find reasonable cause to believe that: "[1] there are competing claims to the disputed work, . . . [2] a party has used proscribed means to enforce its claim to the work in dispute . . . [and 3] the parties have not agreed on a method for the voluntary adjustment of the dispute." *Id.* Only after the Board has made those three required findings will it hold a 10(k) hearing to affirmatively award the disputed work to one of the unions. *See id.* at *3 ("Because we find that all three prerequisites for the Board[']s determination of a jurisdictional dispute are established, we find that this dispute is properly before the Board for [a Section 10(k)] determination.").[11]

Months before the Operators filed the charge initiating this case, the Company filed a Section 8(b)(4)(D) charge against the Laborers alleging that the Operators were pressuring it to reassign to operators certain work it had traditionally assigned to laborers and that, in response, the Laborers had threatened to strike. (A 341.) On February 21, 2012, the Board's Regional Director found no probable cause to believe the Laborers had violated Section 8(b)(4)(D) and

[11] If the Board finds reasonable cause to believe Section 8(b)(4)(D) was violated, then it applies the Section 10(k) standard the Company invokes (Br. 19). *See Roberts Pipeline*, 2014 WL 3850323, at *3-4.

dismissed the Company's charge without holding a Section 10(k) hearing. (A 342.) Specifically, the Regional Director noted that the PLA provided an agreed-upon method for resolving jurisdictional disputes at the prison project, and explained that, "[c]oncerning the Burlington project, the investigation revealed that there [we]re no competing claims for the same work." (A 342.) The Company chose not to appeal the Regional Director's dismissal to the Board's General Counsel.[12] In sum, the Company raised its jurisdictional-dispute claim through the proper channels, but its claim was dismissed for lack of evidence establishing the threshold circumstances required to trigger a jurisdictional determination. This case, on the other hand, involves only the Operators' charge against the Company for the Company's repudiation of the 2010 Quad Cities Agreement. (A 170.) Accordingly, the Company is wrong to suggest (Br. 18-19) that the Board should have applied the Section 10(k) jurisdictional-dispute standard in deciding this contract-repudiation case.

[12] The Company could have appealed the Regional Director's dismissal to the Board's General Counsel pursuant to Section 102.19 of the Board's Rules and Regulations. *See* National Labor Relations Board's Rules and Regulations Part 102, *available at*, http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf (last visited May 11, 2015); *see also* A 342-43 (Regional Director's dismissal letter explaining appeal process).

2. The Operators' charge was timely filed within six months of the Company's clear and unequivocal contract repudiation on April 12, 2012

Section 10(b) of the Act, 29 U.S.C. § 160(b), establishes a six-month limitations period for filing unfair-labor-practice charges with the Board. A charge is timely if it is filed within six months of the date that the charging party had "clear and unequivocal notice" that the unfair labor practice had occurred. *NLRB v. La-Z-Boy Midwest, a Div. of La-Z-Boy Inc.*, 390 F.3d 1054, 1061 n.1 (8th Cir. 2004); *accord A & L Underground*, 302 NLRB 467, 469 (1991) (noting the "Board's long-settled rule that the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act"). But "conflicting signals or otherwise ambiguous conduct" preclude a finding of clear and unequivocal notice. *A & L Underground*, 302 NLRB at 469; *In Re Cab Assocs.*, 340 NLRB 1391, 1392 (2003). And the burden to show that the charging party had such notice rests on the party asserting the 10(b) defense. *Leach Corp.*, 312 NLRB 990, 991 (1993), *enforced*, 54 F.3d 802 (D.C. Cir. 1995); *A & L Underground*, 302 NLRB at 469.

In cases involving contract repudiation, the unfair labor practice occurs at the moment of repudiation, and the limitations period runs from the time a charging party receives "clear and unequivocal notice of total contract repudiation." *A & L Underground*, 302 NLRB at 469; *accord In Re Vallow Floor*

Coverings, Inc., 335 NLRB 20, 20 (2001).[13] That notice may be constructive, in which case "the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence." *Cab Assocs.*, 340 NLRB at 1392; *accord St. Barnabas Med. Ctr.*, 343 NLRB 1125, 1126-27 (2004); *Moeller Bros. Body Shop*, 306 NLRB 191, 193 (1992). The Board has found clear and unequivocal notice when the repudiating party explicitly informs the other party that it is repudiating the contract. *See A & L Underground*, 302 NLRB at 469 (finding an employer clearly and unequivocally repudiated the contract when it "notified the Union by letter that it was repudiating any agreements with the Union"). It has also found clear and unequivocal repudiation when a party wholly fails to comply with a contract. *See St. Barnabas*, 343 NLRB at 1129 ("[W]hen an employer consistently fails to recognize the union or to abide by the terms of a collective-bargaining agreement, the union is put on notice that the employer has repudiated the agreement."); *Natico, Inc.*, 302 NLRB 668, 671 (1991) (union had notice of employer's total repudiation of pension fund contributions contract when employer stopped making payments altogether).

Conversely, the Board has found that there is not adequate notice when the repudiating party's conduct is ambiguous. *See Positive Elec. Enters., Inc.*, 345

[13] By contrast, if the case involves a party's ongoing breach of certain contract provisions, then the fact that the initial breach may have occurred before the 10(b) period will not bar charges based on the employer's continuing failure to comply within the 10(b) period. *St. Barnabas*, 343 NLRB at 1127.

NLRB 915, 919 (2005) (finding no clear and unequivocal repudiation when, *inter alia*, the employer told the union he was not ready to comply with their contract but "his actions otherwise communicated that he was complying with the terms of the agreement"); *Sterrling Nursing Home*, 316 NLRB 413, 416 (1995) (finding the employer's conduct in "repeatedly promis[ing] to remedy the matter" was ambiguous and did not give clear and unequivocal notice of total contract repudiation). Even a party that expressly repudiates a collective-bargaining agreement may create doubt and ambiguity—thereby preventing "clear and unequivocal notice" within the meaning of Section 10(b)—if it engages in conduct inconsistent with total repudiation, such as continued compliance with portions of the purportedly repudiated contract. *See Cab Assocs.*, 340 NLRB at 1392 (finding employer's "conduct was ambiguous" when assessing 10(b) defense because, although it refused to sign a collective-bargaining agreement, the employer nonetheless partially complied with the contract by employing union members as onsite union stewards and deducting and remitting union dues); *Logan Cnty. Airport Contractors*, 305 NLRB 854, 855 (1991) (finding that, despite employer's initial failure to sign a successor agreement, union did not have clear notice of repudiation because employer "continued to make payments to the [union's] Fund" under the contract for over one year before expressly refusing the union's demand to sign it).

Substantial evidence supports the Board's finding (A 7) that the Operators did not have clear and unequivocal notice of the Company's contract repudiation, sufficient to trigger the 10(b) limitations period, until April 12, 2012. Before that date, the Company sent mixed signals to the Operators that were inconsistent with total repudiation. Because the Operators' September 7, 2012 charge was filed within six months of April 12, it was not time barred.

Beginning in October 2011, the Company and the Operators corresponded informally about the work-assignment grievances at the prison and Burlington projects and, during that time, the Company expressed doubts to the Operators about whether it was bound by the 2010 Quad Cities Agreement. In those exchanges, the Company did not, as the Board found (A 5), mention that it did not believe it was a signatory to the 2010 Quad Cities Agreement. On October 13, the Operators sent the Company two letters requesting formal step II grievance meetings to discuss the grievances and the amount of damages the Operators sought. (A 249, 253.) On October 17, Marsh sent a letter to the Operators, in which he acknowledged receipt of the letters and merely stated that the Company could not make the proposed meeting date and would not pay the requested amounts. (A 339.) Again, as the Board found (A 5, 7), the October 17 letter did not disclaim any obligation to comply with the 2010 Quad Cities Agreement, or even mention the agreement. Accordingly, that letter could not have given the

Operators any indication of the Company's later position that it was not bound by the agreement.

Marsh's subsequent November 3 email was also ambiguous about the Company's position on its contractual obligations. Marsh said: "[t]o my knowledge, Seedorff Masonry, Inc. is not a signatory to the [2010] Quad Cities Agreement and none of the memoranda that you sent [the Company] on September 9th appear to bind Seedorff Masonry to that agreement." (A 262.) As the Board emphasized (A 5, 7), in that same email Marsh also requested documentation from the Operators to support their contrary position. When Marsh stated that he needed such information in order to further process the grievances and respond to the Operators' outstanding information requests, he clearly signaled that he was open to changing his position if he received satisfactory proof of a binding agreement. Indeed, the Company's current assertion that it was "demonstrating [its] good faith by giving [the Operators] an opportunity to present additional documents supporting the argument that [the Company] was a party to the [2010 Quad Cities Agreement]" (Br. 37) corroborates that interpretation. (A 262.) *See Stanford Realty Assocs., Inc.*, 306 NLRB 1061, 1065 (1992) (finding employer's statement that "as far as she knew [the employer] did not have a contract [with the union], and she would await the Union sending a copy of the contract and an explanatory letter" was not a clear and unequivocal refusal to bargain).

Moreover, as the Board found (A 7), the Company's conduct after Marsh's November 3 email was inconsistent with total contract repudiation. Notably, the Board credited (A 5 n.12, 7) uncontroverted testimony establishing—and the Company does not contest—that the parties proceeded through all of the steps in the grievance arbitration procedure in the 2010 Quad Cities Agreement, up to and including selection of an arbitrator in February 2012, for an arbitration hearing that was to be held in the Association's offices. The Company now claims (Br. 40-41) that it "initially proceeded with the selection of an arbitrator" because "the PLA was implicated" by one of the grievances, and that it refused to continue with the arbitration when it became clear that the Operators were asserting both grievances under the 2010 Quad Cities Agreement. That assertion is neither factually supported nor relevant to the pertinent issue of what the Operators understood. Factually, there was never any question that the Burlington grievance relied exclusively on the 2010 Quad Cities Agreement, so the Company could not have harbored any confusion as to the source of the Operators' claim. But more importantly, nothing in the record suggests that the Company notified the Operators of its purported reason for following the Quad Cities grievance procedures. From the Operators' perspective, therefore, the Company's questioning of its obligation to comply with the 2010 Quad Cities Agreement was contradicted by the Company's compliance with the grievance-arbitration portion

of that agreement. Those are precisely the type of mixed signals that prevent a finding of clear and unequivocal notice of contract repudiation triggering the 10(b) limitations period. *See Cab Assocs.* and *Logan Cnty. Airport*, *supra* p. 35.

Contrary to the Company's assertions (Br. 32-43), the Board's 10(b) analysis here is also consistent with its analysis in *St. Barnabas Medical Center*, 343 NLRB 1125 (2004). In *St. Barnabas*, the parties had a collective-bargaining agreement but disagreed as to whether it covered certain employees. The union demanded inclusion of the disputed employees, but the employer categorically refused to apply the contract to them. *Id.* at 1125-26. The parties then engaged in negotiations, during which the Board found that the employer's conduct "reinforced the [employer's] position that it did not consider the disputed [employees] to be in the unit." *Id.* at 1128. After the union had refused the employer's proposed compromises and the employer had reiterated its rejection of the union's position, the employer asked the union to give the company a "fresh list" of the employees the union believed should be included in the unit. *Id.* at 1126. The union provided that list but the employer never responded to it. *Id.* At no time during the limitations period did the employer apply any term of the contract to any disputed employee, nor did it ever indicate it would do so. Concluding that the employer had "never strayed from its assertion that it did not

have to apply the contract" to the disputed employees, the Board found the union's charge time-barred. *Id*. at 1128-29.

Contrary to the employer in *St. Barnabas*, the Company had not clearly and unequivocally repudiated the 2010 Quad Cities Agreement before April 12. The Company raised doubts about its contractual obligation on November 3, but simultaneously invited the Operators to provide documentation to the contrary with the implication that such documents could alter the Company's position. And it proceeded under the contractual grievance procedures to address disputes over assignment of covered work for at least three more months. Thus, the Board's analysis here is consistent with the standards it applied in *St. Barnabas*.

Finally, the Company's reliance (Br. 43) on *Moeller Bros. Body Shop*, 306 NLRB 191 (1992), to argue that the Operators had constructive knowledge of its noncompliance with the Quad Cities Agreement is unavailing. In *Moeller*, the Board stated that a union must use reasonable diligence to learn of an employer's noncompliance with a contract, but also made clear that "a union is not required to [] police its contracts aggressively in order to meet the reasonable diligence standard." *Id.* at 193. The Board found that the union in *Moeller* needed only to visit the employer's single shop and could have determined the employer was not complying with "minimal effort" and "mere observation." *Id.* at 192.

Here, on the other hand, the Operators jurisdiction spans across a significant swath of the Midwest, including portions of Illinois, Iowa, and Indiana (A 179) and the Company works in five different states in the Midwest, including Iowa and Illinois. (A 4; A 40.) In other cases involving construction-industry employers and multiemployer Section 8(f) contracts, the Board has found that a union has not had constructive notice of an employer's repudiation solely because the employer was working on construction jobs in the union's jurisdiction. *See, e.g.*, *Baker Elec.*, 317 NLRB 335, 346 (1995), *enforced*, 105 F.3d 647 (4th Cir. 1997) (finding no constructive notice of repudiation when employer signed agreements in 1976 but "succeeded in operating nonunion without discovery by the Union until September 1993" because "the Company's conduct and noncompliance with the 8(f) prehire agreements were not sufficiently 'bald' to put the Union on notice of its intent to repudiate the agreements"); *Neosho Constr. Co., Inc.*, 305 NLRB 100, 102 (1991) (finding no constructive notice of construction industry employer's contract repudiation despite the fact that it worked on construction projects "within the contractual jurisdiction over [14] years without applying the relevant master agreement and without objection from the Union"); *see also Cedar Valley*, 977 F.2d at 1220 ("[W]e find no link between periods of inactivity among the parties and the enforceability of the [Section 8(f)] agreements.").

In sum, the Company's conduct and communications with respect to the 2010 Quad Cities Agreement were ambiguous until its letter of April 12, 2012, when the Company clearly and unequivocally repudiated that agreement. Accordingly, ample record evidence shows that the Operators' charge was timely filed and that the Company has failed to sustain its burden of proof for its 10(b) defense. Moreover, as discussed above, the Company's assertion that it never employs more than one operator in the covered unit fails for lack of proof, and its effort to transform this case into an inter-union dispute is unavailing.

CONCLUSION

At bottom, this is a straightforward instance of a construction-industry employer, bound by a typical assignment of its bargaining rights to a multiemployer association and its ensuing Section 8(f) pre-hire collective-bargaining agreements. The Company's Individual Agreement not only bound it to the Quad Cities Agreements, but also provided clear instructions as to how the Company can terminate its relationship with both the Association and the Operators. Until the Company followed the steps it agreed to when it committed itself to the multiemployer system, it remained bound.

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board
May 2015

s/ Kira Dellinger Vol
KIRA DELLINGER VOL
Supervisory Attorney

s/ Marni von Wilpert
MARNI VON WILPERT
Attorney

National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-0656
(202) 273-2903

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	No. 15-1302
	)	
and	)	
	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO	)	
	)	
Intervenor	)	Board Case No. 25-CA-088910
	)	
v.	)	
	)	
SEEDORFF MASONRY, INC.	)	
	)	
Respondent	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,816 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 13th day of May, 2015

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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	)	
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	)	
SEEDORFF MASONRY, INC.	)	
	)	
Respondent	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2015, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Kelly Randall Baier
Bradley & Riley
2007 First Avenue, S.E.
P.O. Box 2804
Cedar Rapids, IA 52406-2804

Raymond Rinkol, Jr.
Bradley & Riley
2007 First Avenue, S.E.
P.O. Box 2804
Cedar Rapids, IA 52406-2804

Steven A. Davidson
Local 150 Legal Department
6140 Joliet Road
Countryside, IL 60525

Dale P. Pierson
Local 150 Legal Department
6140 Joliet Road
Countryside, IL 60525

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 13th day of May, 2015